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No. 96-871

In The

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN and KHAN & ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Amicus curiae American Petroleum Institute will address the following question:

Whether the Court should reconsider its conclusion in *Albrecht v Herald Co.*, 390 U.S. 145 (1968), that a purely vertical maximum resale price maintenance arrangement is a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

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BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association. More than 300 companies are members and represent various facets of the petroleum industry: exploration, production, transportation, refining, and marketing. As is the case with the petitioner here, many of API's member companies are engaged in marketing petroleum products

through dealers. Thus API's members have a vital interest in this Court's review of the court of appeals' decision in this case.

API believes that its participation will provide the Court with a broader perspective on the principal question presented, and will help bring into focus the economic issues that underlie that antitrust question. All parties have consented to the filing of this brief.

STATEMENT

Respondents operated a gasoline service station in DuPage County, Illinois, under a contract with petitioner State Oil Company, a distributor of petroleum products. Petitioner leased the station to respondents, and supplied respondents with gasoline (sold under the Union 76 brand name) and related products. Pet. App. 1a-2a.

The contract between petitioner and respondent Khan provided that petitioner would suggest a retail price for gasoline, and would sell gasoline to respondents for 3.25 cents per gallon less than the suggested retail price. If respondents believed the suggested retail price was too high or too low, they could ask petitioner to change it. If petitioner changed the suggested price, respondents were entitled to purchase gasoline at 3.25 cents per gallon less than the revised suggested price. If petitioner declined to lower the suggested retail price, respondents remained free to charge a lower price and, by doing so, operate on a lower margin. If petitioner declined to raise the suggested retail price, respondents could charge a higher price, but in that event the contract provided that respondents were required to pay petitioner the difference between the suggested retail price and the actual retail price, multiplied by the number of gallons sold at the higher price. In effect, therefore, the contract required the rebating to petitioner of whatever revenues resulted from an increase above the suggested price. Pet. App. 2a.

Petitioner terminated respondents' contract for failing to pay rent due for the lease of the station. Respondents thereupon sued petitioner, alleging that petitioner had engaged in maximum resale price maintenance, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994). Respondents' complaint also alleged violations of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-41 (1994), and breach of contract under Illinois law. Pet. App. 2a, 24a-25a.

The district court granted summary judgment for petitioner. Pet. App. 24a-42a. The district court concluded that the legality of the vertical maximum pricing restriction under the Sherman Act should be evaluated under the rule of reason, and that respondents had presented no evidence concerning essential elements of a rule of reason case, such as market power. *Id.* at 33a-40a. The district court also ruled that a study by plaintiffs' economic expert was inadmissible, and that absent this study plaintiffs could not show that they had been injured. *Id.* at 37a-40a.[1]

The court of appeals reversed the district court's ruling on the antitrust issue. Pet. App. 1a-20a. Chief Judge Posner's opinion for the court concluded that the rebate requirement effectively imposed a maximum resale price restriction. The court of appeals then followed this Court's decision in *Albrecht v. Herald Company*, 390 U.S. 145 (1968), which held that vertical maximum resale price fixing is a per se violation of Section 1 of the Sherman Act. Although the court of appeals concluded that "*Albrecht* was unsound when it was decided, . . . is inconsistent with later decisions by the Supreme Court . . . [and] should be overruled," Pet. App. 9a,

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[1] The district court rejected respondents' PMPA claim, on the ground that petitioner had not terminated respondents' franchise (Pet. App. 29a-33a), and also rejected respondents' state-law contract claim, on the ground that respondents offered no facts to support their legal claim (*id.* at 40a-42a).

it heeded this Court's admonitions that lower courts should not anticipate the overruling of a decision of this Court. *Id.* at 9a, citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam). Accordingly, the court of appeals reversed the entry of summary judgment for petitioner on the antitrust claim. Pet. App. 14a-15a.[2]

Judge Ripple wrote a concurring opinion emphasizing that this case presents "a wholly vertical arrangement . . . [with] no hint of any concrete horizontal effect." Pet. App. 17a.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to reconsider whether a purely vertical maximum price restraint should be per se illegal under Section 1 of the Sherman Act. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which so holds, does not represent a deeply ingrained, oft-considered, oft-reiterated principle of antitrust law. *Albrecht*, rather, "is the only [prior] case in which the Court has confronted an unadulterated vertical, maximum-price-fixing arrangement." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 336 n.6 (1990) ("*ARCO*").

Albrecht is an aberration that has been subjected to sustained and virtually unanimous negative criticism by scholarly commentators. Discussing *Albrecht* in their 1978 treatise, Phillip Areeda and Donald Turner stated that "[i]t seems most doubtful that the purposes of the antitrust laws are served by awarding damages for the impairment of the

[2] The court of appeals also held that the district court had abused its discretion in ruling inadmissible the report of respondents' economic expert (Pet. App. 11a-13a), and affirmed the dismissal of the state-law contract claim (*id.* at 14a-15a).

plaintiff's monopoly power over newspaper subscribers." Roger D. Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 Vand. L. Rev. 1007, 1021 (1991), quoting 2 Phillip Areeda & Donald Turner, *Antitrust Law* ¶ 347 (1978). Another leading commentator has stated: "Few Supreme Court decisions have proved more anticompetitive than *Albrecht*." Herbert Hovenkamp, *Federal Antitrust Policy* § 11.5c at 422 (1994). Even defenders of the per se rule against minimum resale price fixing generally acknowledge that maximum vertical price fixing raises different issues that warrant rule of reason treatment.

This Court, as well as lower courts, has questioned the continued validity of *Albrecht*'s per se rule. This Court in *ARCO* candidly stated that maximum price fixing may in some circumstances protect consumers from exploitation, and that "the procompetitive potential of a vertical maximum price restraint is more evident now [in 1990] than it was when *Albrecht* was decided," pointing to the overruling of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and the increased possibility of dealer market power derived from lawful exclusive territories. 495 U.S. at 343 n.13.

Albrecht, like *Schwinn*, placed heavy reliance on the proposition that any restraint on the freedom of a dealer to compete as it wishes is per se illegal. But this Court has rejected that proposition since *Albrecht*. In addition, *Albrecht* is difficult to reconcile with *ARCO* and other decisions of this Court applying the doctrine of antitrust injury, which have recognized that non-predatory "[l]ow prices benefit consumers regardless of how [they] are set," and "do not threaten competition." 495 U.S. at 340.

In view of these developments in the law, maximum vertical price fixing is no longer a proper subject for per se treatment — *i.e.*, it is now clearly *not* the case that application of the rule of reason would be futile because the Court can predict with confidence that the rule of reason will condemn the practice. The Court should expressly overrule *Albrecht*, and establish that maximum resale price maintenance is subject to analysis under the rule of reason.

ARGUMENT

I. THE PER SE RULE, WHICH IS RESERVED FOR CONDUCT THAT ALWAYS OR ALMOST ALWAYS HAS ANTICOMPETITIVE EFFECTS, SHOULD NOT BE APPLIED TO MAXIMUM VERTICAL PRICE MAINTENANCE, WHICH THE COURT HAS RECOGNIZED MAY BE PROCOMPETITIVE.

The Court has held repeatedly that Section 1 of the Sherman Act was intended to prohibit only *unreasonable* restraints of trade. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (citing additional cases). In determining whether a particular restraint is reasonable, the Court's inquiry "is confined to a consideration of impact on competitive conditions." *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978). "Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason — that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Business Electronics*, 485 U.S. at 723, quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). "[T]here is a presumption in favor of a rule-of-reason standard." *Business Electronics*, 485 U.S. at 726.

Although the Court has departed from the presumption in favor of a rule of reason standard and has held that certain categories of agreements are illegal per se, thus "dispensing with the need for case-by-case evaluation," 485 U.S. at 723, the Court has reserved the per se rule for "'conduct that is manifestly anticompetitive,'" *i.e.*, conduct "'that would always or almost always tend to restrict competition and decrease output.'" *Id.*, quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985), quoting, in turn, *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979). As the Court stated in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."

The Court has accordingly applied the per se rule to horizontal price-fixing agreements, *see FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-23 (1990); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927), as well as to horizontal agreements dividing territories, *see Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). The per se rule against horizontal price-fixing also has been applied to agreements among competitors setting minimum or maximum resale prices. As Professor Areeda has noted, "competitors have so strong an incentive to escape price competition that it is exceedingly dangerous to allow them to discuss and come to *any* kind of consensus about prices." 8 Phillip E. Areeda, *Antitrust Law* ¶ 1637c, at 405 n.11 (1989).[3]

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[3] The court of appeals' opinion suggests that competitors' agreements to fix minimum resale prices may be motivated by a desire to prevent cheating on their horizontal price-fixing cartel, and that agreements among

These are all horizontal arrangements among competitors. The Court has expressly recognized a distinction between horizontal and vertical restraints. It has stated that "the scope of *per se* illegality should be narrow in the context of vertical restraints," *Business Electronics*, 485 U.S. at 724, because "[v]ertical restrictions promote interbrand competition," which is "the primary concern of antitrust law." *Sylvania*, 433 U.S. at 52 n.19, 54.

To be sure, the Court has adhered to the per se rule against vertical *minimum* resale price maintenance, which was established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). *See Business Electronics*, 485 U.S. at 724-26; *Sylvania*, 433 U.S. at 51 n.18. But, as discussed at p. 9, *infra*, this Court has now acknowledged, given *Sylvania*, the possible procompetitive impact of maximum retail price maintenance. *ARCO*, 495 U.S. at 343 n.13. Moreover, as this Court explained in *Dr. Miles*, *Sylvania*, and *Business Electronics*, the bases for its concern with vertical price fixing were the possibilities that such arrangements may serve to organize dealer-level cartels, or to deter cheating on a price-fixing cartel at the supplier level. *See Business Electronics*, 485 U.S. at 725-26. But maximum resale price maintenance, unlike minimum resale price maintenance, does not prevent retailers from competing among themselves as to price, and because dealer price cuts are possible does not serve to prevent cheating by members of a supplier cartel.

Hence, *Albrecht*'s per se rule against vertical maximum resale price maintenance rests on far shakier economic and precedential foundations than it once did. It is clearly no longer the case, if it ever was, that a court can predict with

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competitors on maximum resale prices may be designed to reduce dealer margins. Pet. App. 4a-5a.

confidence that the rule of reason will condemn a vertical maximum resale price arrangement.

II. THE PER SE RULE OF *ALBRECHT* IS INCONSISTENT WITH THIS COURT'S SUBSEQUENT ANTITRUST DECISIONS.

Albrecht's extension of the per se rule to vertical maximum price restraints is an aberration. *Albrecht* is the only decision of this Court that has applied a rule of per se illegality to "an unadulterated vertical, maximum-price-fixing arrangement." *ARCO*, 495 U.S. at 336 n.6.[4] The Court's doubt as to its continued validity in the face of later developments is indicated in *ARCO*, where this Court merely "assume[d], *arguendo*, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the per se rule." 495 U.S. at 335 n.5. *ARCO* itself expressly recognized (1) that vertical maximum price maintenance "may have procompetitive interbrand effects," *Id.* at 343 n.13, (2) that "the procompetitive potential of a vertical maximum price restraint is more evident now than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* in 1968," *id.*, citing *Schwinn*, 388 U.S. 365, 375-76 (1967); and (3) that non-price vertical agreements now are subject "only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely." 495 U.S. at 343 n.13.

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[4] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), by contrast, presented "an additional horizontal component." *ARCO*, 495 U.S. at 336 n.6. Although the two suppliers in *Kiefer-Stewart* were owned by a common parent, and therefore would not be regarded as capable of conspiring with each other for purposes of Section 1 today, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), they were treated as competitors in *Kiefer-Stewart*. *See* 340 U.S. at 215.

In addition, a per se rule against maximum resale price restrictions is in several ways inconsistent with this Court's decision in *Sylvania*. *Albrecht* was decided one year after *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court's decisions in *Albrecht* and *Schwinn* both turned in large part on the proposition that the antitrust laws protect "dealer freedom," and that restraints on alienation — *i.e.*, on the dealer's freedom to resell as it wishes — should be per se violations of the antitrust laws. *See* 390 U.S. at 152; 388 U.S. at 379-80.

In *Sylvania*, however, the Court overruled *Schwinn*'s per se rule against vertical territorial restrictions. In rejecting *Schwinn*, *Sylvania* expressly rejects many of the reasons the Court gave for its decision in *Albrecht*.[5]

First, *Sylvania* expressly rejects the "dealer freedom" rationale that provided the essential underpinning for *Albrecht*. The Court forthrightly declared that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." 433 U.S. at 53 n.21, quoting *Schwinn*, 388 U.S. at 392 (Stewart, J., dissenting).[6]

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[5] As a leading commentator observes, *Sylvania* "explicitly or implicitly undercut every rationale for the per se rule offered in *Albrecht*, with the exception of the 'disguised minimum' concern." 8 Phillip E. Areeda, *Antitrust Law* ¶ 1638c (1989).

[6] The Court observed that its "isolated reference" in *Schwinn* to "the ancient rule against restraints on alienation" had "provoked sharp criticism from virtually all of the commentators," who "regarded the Court's apparent reliance on the 'ancient rule' as both a misreading of legal history and a perversion of antitrust analysis." 433 U.S. at 53 n.21 (citations omitted). *See also* Herbert Hovenkamp, *Federal Antitrust Policy* § 11.5a (1994) (restraints on alienation were not illegal at common law; by the time of *Dr. Miles*, resale price maintenance agreements were both legal and enforceable, unless the supplier had a large market share and the agreement was used to facilitate horizontal price-fixing) (citations omitted).

Second, *Sylvania* rejects *Albrecht*'s leap from the per se illegality of *horizontal* maximum price agreements to the per se illegality of *vertical* maximum price agreements. *Sylvania* draws a sharp distinction between horizontal restrictions and vertical restrictions. The Court later reaffirmed the importance of this distinction in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Business Electronics*. Although *Sylvania* noted the per se illegality of vertical price fixing, 433 U.S. at 51 n.18, it is clear that in context the reference to established per se illegality was to *minimum* resale price maintenance which was thought to facilitate cartelization of dealers and suppliers. *See* p. 8, *supra*.[7]

Third, *Sylvania* "make[s] clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than — as in *Schwinn* — upon formalistic line drawing." 433 U.S. at 58-59. In *Business Electronics*, the Court's decision expressly notes that imposing the per se rule on vertical restrictions merely because they contain the word "price" is the type of "formalism [that] was explicitly rejected in *GTE Sylvania*." 485 U.S. at 728. Hence, the fact that maximum resale price restrictions "directly" involve price in and of itself provides no demonstrable economic basis for invoking the per se rule. As

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[7] In commenting on *Sylvania*, then-Professor Pitofsky observed that the *Sylvania* reason for adhering to the per se rule against vertical price fixing, which focused "principally on its tendency to stabilize supplier price levels," undermined the *Albrecht* per se ruling since in *Albrecht* "[t]here was no suggestion, as indeed there could not be, that maximum price fixing would be likely to stabilize a supplier cartel." Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev., 1, 16, n.59 (1978).

the Court noted in *Business Electronics* in rejecting an effort to apply the per se rule to vertical restraints that contain the word "price" or that affect retail prices, "all vertical restraints, including the exclusive territory agreement held not to be *per se* illegal in *GTE Sylvania*, have the potential to allow dealers to increase 'prices' and can be characterized as intended to achieve just that." 485 U.S. at 728.

Fourth, *Sylvania* recognizes that suppliers generally have an incentive to impose socially optimal restrictions on dealers, thus undermining *Albrecht*'s concern that suppliers will impose the "wrong" price. *See also Business Electronics*, 485 U.S. at 726 ("interbrand competition is the primary concern of the antitrust laws").

Fifth, *Sylvania*'s recognition that territorial restrictions often are procompetitive and lawful under the antitrust laws increases the procompetitive potential of maximum price restraints, because "exclusive territorial arrangements . . . mak[e] monopolistic behavior by dealers more likely." *ARCO*, 495 U.S. at 343 n.13.

In sum, *Albrecht*, like *Schwinn*, has been the subject of sustained and uniform criticism, both in scholarly commentary and in the courts.[8] *Schwinn* was an abrupt departure from the Court's prior precedents, that was corrected by *Sylvania*. *See* 433 U.S. at 47. *Albrecht* remains as an isolated precedent, issued in the penumbra of *Schwinn*, that resulted from the Court's brief willingness to deploy the per se rule to implement a formalistic antipathy towards restraints on alienation.

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[8] *See infra* note 9.

III. MAXIMUM RESALE PRICES OFTEN HAVE PROCOMPETITIVE EFFECTS AND RARELY HAVE ANTICOMPETITIVE EFFECTS.

1. Maximum Resale Prices Often Have Procompetitive Effects.

As noted earlier, p. 9, *supra*, in *ARCO* the Court acknowledged that vertical maximum price restraints may be procompetitive: "When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist." 495 U.S. at 343 n.13. The Court cited some of the "[m]any commentators [who] have identified procompetitive effects of vertical, maximum price fixing." 495 U.S. at 343 n.13.[9]

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[9] In addition to the authorities cited in *ARCO*, *see* Areeda, *supra*, ¶¶ 1634-40 (1989 & 1995 Supp.); ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* 77-96 (1977); F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990); Roger D. Blair & Amanda K. Esquibel, *Maximum Resale Price Restraints in Franchising*, 65 Antitrust L.J. 157 (1996);Roger D. Blair & James M. Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 Syracuse L. Rev. 43 (1986); Roger D. Blair & David L. Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. Fla. L. Rev. 461 (1981); Roger D. Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 Vand. L. Rev. 1007 (1991); Stephen Calkins, *The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy*, 59 Antitrust L.J. 339 (1991); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135 (1984); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & Econ. 263 (1991); Robert J. Larner, *Vertical Price Restraints: Per Se or Rule of Reason?*, in *Economics & Antitrust Policy* 123 (Robert J. Larner & James W. Meehan, Jr., eds., 1989); Fritz Machlup & Martha Taber, *Bilateral Monopoly, Successive Monopoly, and Vertical Integration*, 27 Economica 101 (1960); William H.

Maximum resale prices can be procompetitive when dealers possess some degree of market power, whether because the dealer occupies a strategic physical location or because the supplier, itself with some market power, sells to relatively few dealers or grants dealers exclusive territories.[10]

A dealer with market power can be expected to exercise it by raising prices leading to reduced sales. Such higher prices harm consumers. The reduced sales harm the supplier, who does not share in the dealer's supracompetitive profits. In this situation, a maximum price restriction is a procompetitive means for suppliers, pursuing their own interests, to prevent dealers from gouging consumers.

In view of the *Albrecht* per se ban, a supplier may turn to other ways to prevent dealers from charging supracompetitive

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Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

Even those who support retention of the per se rule against minimum resale price maintenance acknowledge that maximum resale price maintenance requires a different analysis. *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1490 (1983) (maximum vertical price fixing "probably *should* be treated under a rule of reason") (citing Frank Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886 (1981)).

[10] The fact that a supplier may have market power (*e.g.*, arising from brand differentiation) does not detract from the pro-competitive impact of maximum resale price maintenance. In many instances, supplier market power does not violate the antitrust laws. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (Section 2 of the Sherman Act is not violated if market power is "a consequence of a superior product, business acumen, or historic accident"). Whether or not the supplier's market power is viewed as undesirable, there is no reason "to allow an *additional* and *unnecessary* monopoly toll on society that a manufacturer wishes to prevent." 8 Phillip E. Areeda, *Antitrust Law* ¶ 1636b, at 397 (1989).

prices. A supplier might integrate vertically, either taking over the entire retailing function itself or competing with its dealers through a dual distribution system. *See Sylvania*, 433 U.S. at 57 n.26 (per se rules may "create[] an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen"); *see also* Blair & Esquibel, *supra*, at 169-72. The supplier might in the alternative appoint more dealers, or eliminate territorial or customer restrictions that limit intrabrand competition. Or the supplier might resort to indirect methods, such as advertising a suggested retail price (to increase consumer resistance to higher prices), or imposing a sales quota on its dealers.[11]

Each of these options may well be less efficient than a system of independent dealers operating under a maximum price constraint. As the Court recognized in *ARCO*, "[i]f an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors." 495 U.S. at 343 n.13. Moreover, some of the options may simply be unavailable to some suppliers. For example, if distribution is a "natural monopoly," a supplier will not be able to appoint more dealers or adopt a dual distribution system. And if dealers carry multiple products or multiple brands, vertical integration may not be possible.

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[11] The supplier might also attempt to establish a consignment arrangement with the dealer. *See United States v. General Elec. Co.*, 272 U.S. 476 (1926). In *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), however, the Court held that the supplier was liable under Section 1 despite a consignment arrangement, because the nominal consignees possessed many of the indicia of ownership. *But cf. Sylvania*, 433 U.S. at 56 (recognizing that the "distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact").

2. Vertical Resale Price Ceilings Are Unlikely To Have Anticompetitive Effects.

Even in *Albrecht*, the Court recognized that "[m]aximum and minimum price fixing may have different consequences in many situations." 390 U.S. at 152. As many commentators have recognized, maximum resale prices do not present the same anticompetitive dangers as minimum resale prices: a minimum price prevents intrabrand price competition below a price floor set by the supplier; a maximum price ordinarily allows intrabrand price competition below the supplier's price ceiling. Thus, a price ceiling, unlike a price floor, does not insulate dealers from competition and cannot be used to organize a dealer cartel or deter cheating by members of a supplier cartel. *See, e.g.* Areeda, *supra*, ¶ 1637b.

Accordingly, a per se rule against maximum resale prices cannot be justified simply by analogy to the per se rule against minimum resale prices. *See Business Electronics*, 485 U.S. at 726 (departures from the rule of reason "must be justified by demonstrable economic effect . . . rather than formalistic distinctions").

The Court's opinion in *Albrecht* did not rely on the cartel-creation or cartel-facilitation explanations identified in *Dr. Miles*, *Sylvania*, and *Business Electronics* as the bases for invalidation of vertical price fixing. Rather, the *Albrecht* opinion suggests several other possible anticompetitive consequences of maximum resale price restrictions. 390 U.S. at 152-53. Upon analysis, however, none of the consequences hypothesized by the Court in *Albrecht* appears likely. Most have been implicitly or explicitly rejected after detailed analysis by subsequent decisions.

i. *"Dealer Freedom."* The *Albrecht* Court's decision relies in large part on its statement that maximum resale prices would "cripple the freedom of traders." 390 U.S. at 152, quoting *Kiefer-Stewart Co.*, 340 U.S. at 213. This rationale,

which was a cornerstone of the Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379-80 (1967), as well as the decision in *Albrecht*, was, as noted above, p. 10, decisively rejected in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which overruled *Schwinn*.

ii. *Setting Prices "Too Low" and Restricting Dealer Services.* In *Albrecht*, the Court expressed concern that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. 390 U.S. at 152-53. There are several reasons why this concern is misplaced and in any event does not warrant a rule of per se illegality. *See* Areeda, *supra*, ¶ 1637e-f.

Suppliers have no incentive to set a price that is too low, because in so doing they decrease their own profits. The Court in *Sylvania* acknowledged the economic arguments that suppliers generally have an incentive to impose socially optimal restrictions on their dealers. 433 U.S. at 56 & n.24. If the supplier makes a mistake, it is likely to be self-correcting. If the price is too low to permit dealers to earn a competitive rate of return, dealers will not be willing to continue carrying the product. And if the price is too low to permit dealers to provide services that consumers want and are willing to pay for, the supplier will soon find that consumers are switching to competing products that are sold with the desired services, or are simply buying less of the supplier's product. Moreover, dealers as well as suppliers may make pricing mistakes.

iii. *Limiting the number of dealers.* The *Albrecht* opinion observed that "[m]aximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice

competition." 390 U.S. at 153. This seems to suggest that maximum prices may be set so low that only a few dealers can survive. But it is not clear why a supplier, having established a distribution network, would find it in its interest to render a number of its distributors inoperative through a penalizingly low maximum. Consequently, the Court's concern about "channeling" distribution is just another way of suggesting that, as discussed above, the supplier may mistakenly set a price that is "too low." *See* Areeda, *supra*, ¶ 1637g.

iv. *Maximum Price as a "Disguised Minimum" Price.* *Albrecht* also observed that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 153. In practice, however, it would be difficult for a supplier to impose a "disguised" minimum resale price in the form of a maximum resale price. If the supplier did not impose sanctions for selling below the maximum price, the "disguised minimum price" would amount to no more than a suggested retail price, which is lawful. If the supplier disciplined dealers who sold below the maximum price, it would be evident in most cases that the ostensible maximum price is in fact an illegal minimum price. The issue in this case is whether a vertical maximum should be illegal per se; it is not whether a vertical maximum is to be legal per se even if it is a de facto vertical minimum. *See* Areeda, *supra*, ¶ 1637c.

v. *Other Possible Anticompetitive Effects are Non-existent or Negligible.* Although not referred to by the *Albrecht* opinion, a maximum resale price conceivably could be used as part of a predatory pricing scheme. But predatory pricing may itself be a violation of the antitrust laws, *see Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-18 (1986), and a per se ban on vertical maximum price maintenance is not justifiable as needed to police predation. *See* Areeda, *supra*, ¶ 1637h.

Maximum prices might be argued to be a method of "exploiting" dealers by requiring them to sell at a loss. However, in the long run the supplier will not be able to require the dealer to accept less than a competitive return for its services; the dealer will switch to other brands or go out of business. Even in the short-run, a price ceiling would not harm consumers, and even the dealer may be better off living with the ceiling if the supplier, driven by its marketing concerns to lower the resale price, had as a legal alternative course of action cutting the dealer off immediately. *See* Areeda, *supra*, ¶ 1637i.

Finally, there are circumstances in which maximum prices might be imposed as part of a price discrimination scheme. Again, however, the possible benefits of discouraging price discrimination (for which the Robinson-Patman Act may provide relief) cannot justify a per se rule of illegality. *See* Areeda, *supra*, ¶ 1637j.

IV. THE *ALBRECHT* PER SE RULE IS INCONSISTENT WITH THE SUBSEQUENTLY DEVELOPED ANTITRUST INJURY DOCTRINE.

The post-*Albrecht* development of the doctrine of antitrust injury has spotlighted the inadequacies of the *Albrecht* per se rule. Beginning with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), the Court held that a plaintiff in an antitrust case must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts

unlawful."[12] In *ARCO*, 495 U.S. 328 (1990), the Court held that a competing dealer suffers no antitrust injury when as a result of vertical maximum price fixing his competitors charge a lower but non-predatory price. The Court reasoned that "[t]o hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Id.* at 338. The Court further stated that this would contradict the basic principle that "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Id.*, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original). In addition, the Court observed in *ARCO*: "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." 495 U.S. at 340. Given the Court's belief expressed in *ARCO* that low non-predatory prices benefit consumers and do not threaten competition, it is hardly clear what the "antitrust injury" of a dealer subject to a vertical maximum price constraint could be.

The Court's decision in *ARCO* assumed, "*arguendo*, that *Albrecht* correctly held that vertical, maximum price-fixing is subject to the *per se* rule", 495 U.S. at 335 n.5, and accordingly assumed that in some way the "potential effects on dealers" identified in *Albrecht* would qualify as antitrust injury. 495 U.S. at 336. For the reasons explained above, however, maximum resale price maintenance is primarily procompetitive. While there may be occasional instances in which one could contrive a theory of antitrust injury assuming the validity of *Albrecht*, the difficulty in finding instances in

[12] *See also Cargill*, 479 U.S. at 109-110; *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539-40 (1983); *Blue Shield v. McCready*, 457 U.S. 465, 483 & n.19 (1982); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

which the antitrust injury requirement is met indicates that the practice is frequently not anticompetitive and demonstrates that a rule of per se illegality is inappropriate.[13]

The fact that a variety of cases in which plaintiffs invoked the *Albrecht* per se rule have foundered for lack of antitrust injury or injury in fact[14] strongly suggests that the per se rule is an empty shell and should be abandoned.

[13] In *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F. 3d 745 (1st Cir. 1994), the First Circuit, governed by the decision in *Albrecht*, dutifully speculated on the possibility that a dealer who could have profited by providing services to improve the value of the product had there been no ceiling could recover the profits associated with lost sales. At the same time that court observed that insofar as plaintiff's claim merely refers to "'losses' that occurred because the agreement prevented Caribe from raising prices above the competitive level, it is at least arguable that no 'antitrust injury' occurred." *Id.* at 753-54 (citation omitted).

[14] *See Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) (competing dealer lacks antitrust standing to challenge maximum resale prices); *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1985) (plaintiffs would not have raised prices absent a maximum price restriction, because they had the sophistication to understand that they would have been terminated); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 706 (7th Cir.) (suggesting that "a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices" may be lawful despite *Albrecht*), *cert. denied*, 469 U.S. 1018 (1984); *Knutson v. Daily Review, Inc.*, 548 F. 2d 795 (9th Cir. 1976) (dealers entitled only to nominal damages, because given their knowledge of the newspaper business, they would not have raised prices even if they had been free to do so), *cert. denied*, 433 U.S. 910 (1977); *Newberry v. Washington Post Co.*, 438 F. Supp. 470 (D.D.C. 1977) (plaintiffs entitled only to nominal damages, because there is no proof that they would have raised their prices absent a maximum price restriction, and no proof of the subscribers' response to a price increase).

V. THE DOCTRINE OF *STARE DECISIS* DOES NOT REQUIRE THE COURT TO ADHERE TO *ALBRECHT*.

The doctrine of *stare decisis* is a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and not an "inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Although the Court generally is reluctant to overrule its statutory precedents, on the ground that "Congress is free to change this Court's interpretation of its legislation," *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), the Court has not hesitated to overrule its statutory precedents "when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.'" *Neal v. United States*, 116 S. Ct. 763, 769 (1996), quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). As explained above, the conceptual underpinnings of *Albrecht* have been destroyed by the Court's subsequent decisions concerning vertical restraints.

Furthermore, Section 1 of the Sherman Act is not an ordinary statute. It is "the Magna Carta of free enterprise, as important to the . . . free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). Because Congress did not define the term "restraint of trade," the Court has properly regarded the Sherman Act as inviting the Court to take a common-law approach. *See, e.g.*, Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 2.4, at 52-53 (1985). Many basic legal principles under Section 1 — including the distinction between horizontal and vertical agreements, the distinction between the per se rule and the rule of reason, and the principle that Section 1 forbids only unreasonable restraints of trade — were developed by this Court. The Court thus

should be more willing to reconsider one of its precedents in this area than it would be to reconsider a precedent interpreting a narrower statute, more recently enacted or as to which there is a history of congressional amendment of basic statutory language, and not the subject of an extensive body of judicial precedent developed by this Court.[15]

Accordingly, the Court should overrule *Albrecht*, and hold that vertical maximum resale price maintenance is subject to analysis under the rule of reason.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[15] Although Congress has legislated with respect to minimum resale price maintenance — first authorizing States to permit minimum resale price maintenance in the Miller-Tydings Act of 1937, Pub. L. No. 75-314, 50 Stat. 693, and then withdrawing that authorization in the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 — it has never enacted legislation addressing *maximum* resale price maintenance.